PP

v.

RONNY ABDULLAH & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT J
[CRIMINAL TRIAL NO: S-47-01-2002]
17 FEBRUARY 2006

CRIMINAL PROCEDURE: *Mens rea - Deduced from conduct - Charge of murder - Whether nature of wounds and manner in which they were inflicted led to irresistible inference of intention to kill - Penal Code, s. 302*

CRIMINAL PROCEDURE: *Summing up - Common intention - Common intention to commit murder - Prosecution need only establish that act committed by one accused and others participated in it in furtherance of a common intention - Penal Code, s. 302*

CRIMINAL PROCEDURE: *Summing up - Circumstantial evidence - Whether cumulative effect of series of unbroken chain of circumstantial evidence lead to irresistible inference that offence was committed*

EVIDENCE: *Relevancy - Motive - Whether absence of motive is of consequence in a murder charge*

EVIDENCE: *Witness - Inconsistencies in testimony - Whether trivial inconsistencies affect veracity of prosecution witnesses or colour evidence led by prosecution as a whole*

The 1st and 2nd accused were charged with the murder of one Amanra bte Jakaria by slashing her neck with a parang. The prosecution case was grounded on circumstantial evidence, there being no eye witness to the actual killing of the deceased. The evidence showed that on the evening of the murder the deceased and PW7 were sitting under a recreational hut in a park. The 1st and 2nd accused had suddenly attacked the couple wielding a parang and had dragged the deceased away. The subsequent post mortem revealed that she had been sexually assaulted. The 1st accused had led the police to recover the body-fit shirt worn by the deceased near the place where the dead body was found. The DNA typing result indicated that the male profile derived from the vaginal swabs taken from the deceased matched the profile of the blood specimen taken from the 1st accused. Three strands of hair from the pubic hair combing sample taken from the deceased matched the pubic hairs taken from the 1st accused.

The 1st accused gave evidence that on the evening in question, he had come across PW7 and the deceased at the recreational hut and saw PW7 fondling the deceased. The 1st accused claimed that out of anger, he had struck PW7 twice with a samurai sword but missed and instead the deceased got struck on her neck. The 1st accused admitted having sexual intercourse with the deceased while she was still alive. Learned counsel for the 1st accused argued that the intention to kill had not been established. The 2nd accused gave evidence on oath to establish his *alibi*. He claimed that on the evening in question he was building a house for one Haji Aras helped by his son Julastry.

Held (finding the 1st and the 2nd accused guilty as charged):

(1) The cumulative effect of the series of unbroken chain of circumstantial evidence led to the irresistible inference and conclusion that either the 1st or the 2nd accused slashed the neck of the deceased which resulted in her death and that the slashing was in furtherance of a common intention to commit murder by causing the death of the deceased. (para 15)

(2) In cases of common intention, the prosecution need only establish that one of the accused committed the act and that the others participated in it in furtherance of a common intention. Applying these principles to the facts and circumstances of this case, it was abundantly clear that the prosecution had established the element of common intention. (para 15)

(3) The two clean cut wounds on the neck of the deceased were inflicted on a very vulnerable part of the human anatomy. One exposed the muscle while the other cut through the cervical up to the trachea, which was the cause of death. The irresistible inference was the intention to kill the deceased. (para 15)

(4) The testimony given by the 1st accused relating to the killing of the deceased was inherently incredible, a version which was concocted by the 1st accused. The *alibi* of the 2nd accused was not established. The absence of motive is of no consequence because it is not an essential requirement for murder, although if one is established it would be useful for the prosecution to prove its case. This piece of evidence or lack of it and other small pieces of evidence of trivial inconsistencies could not affect the veracity of the witnesses for the prosecution nor colour the evidence led by the prosecution as a whole. On the totality of the evidence adduced at the trial the prosecution had established the charge against the 1st and 2nd accused beyond reasonable doubt and the 1st and 2nd accused had failed to cast a reasonable doubt on the prosecution case. (paras 23 & 25)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chwen Kong v. PP [1962] MLJ 307 ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Eng Sin v. PP [1974] 2 MLJ 168 ***(refd)***
Martin v. Osborne [1936] 55 CLR ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
PP v. Magendran Mohan [2005] 3 CLJ 592 HC ***(refd)***
PP v. Muhamad Nasir Shaharuddin & Anor [1994] 2 MLJ 576 ***(refd)***
PP v. Saimin & Ors [1971] 2 MLJ 16 ***(refd)***
PP v. Sainal Abidin Mading [1998] 3 CLJ 41 HC ***(refd)***
Rex v. Vincent Banka & Anor [1936] MLJ 53 ***(refd)***
Sunny Ang v. PP [1968] 2 MLJ 195 ***(refd)***
Tan Buck Tee v. PP [1961] 27 MLJ 176 ***(refd)***
Tham Kai Yau & Ors v. PP [1977] 1 MLJ 174 ***(refd)***
The Emperor v. Nga Aung Thien All India Report [1935] ***(refd)***

Legislation referred to:
Penal Code, ss. 302, 304

For the prosecution - Wan Abdul Razak Wan Hussin; DPP
For the 1st accused - David Hiew; M/s MF Poon & Co
For the 2nd accused - Gabriel Ho; M/s Gabriel Ho & Co

Reported by Amutha Suppayah

JUDGMENT

Linton Albert J:

[1] In the evening of 26 March 2001 two couples were sitting under the recreational hut erected at Sandakan Park. Each couple was seated on opposite benches fixed to the hut. They were suddenly attacked and violently assaulted by two men, one of whom wielded a parang. Three of them managed to escape. One of them was not so lucky. She was last seen dragged by one of the two men who had a parang in one hand, and the last that was heard from her were her unanswered cries for help as she was dragged away. Her naked and lifeless body was discovered that very night. There were visible wounds to her cheek and neck. The subsequent post mortem revealed that there was semen in her vagina suggesting that she had been sexually assaulted. Such were the features of barbaric cruelty in the death of Amanra bte Jakaria. She was 18 years old, of medium built, with a height of 157 cm and weighed 45 kilograms. The charge against the 1st and 2nd accused reads as follows:

That you, on 26th March 2001 at around 6.30pm, at Sandakan Park, Mile 7, Labuk Road, in the District of Sandakan, in the State of Sabah, in furtherance of a common intention between you both, did commit murder by causing the death of one Amanra bte Jakaria, 18 years old female by slashing her neck with a parang and that you have thereby committed an offence punishable under Section 302 of the Penal Code.

[2] The prosecution called 30 witnesses most of whom were subjected to careful and rigorous cross examination by Mr. David Hiew and Mr. Gabriel Ho who were assigned to defend the 1st and 2nd accused respectively. Learned DPP Mr. Wan Abdul Razak Wan Hussin had in his opening address disclosed that the prosecution case was grounded on circumstantial evidence, there being no eyewitness to the actual killing of the deceased, Amanra bte Jakaria.

[3] All the survivors of the attack in the evening of 26 March 2001 at Sandakan Park were called as witnesses for the prosecution. They were Norliah Sungsang (PW3), Norazmi bin Yunus (PW6) and Azman Abd. Hamid (PW7). PW3 and PW6 were the couple who sat on the bench opposite the bench occupied by PW7 and the deceased who were the other couple on that fateful evening. PW7 testified that he had known the deceased for two years and that she was his girlfriend. On 26 March 2001 while he and the deceased were sitting on one bench facing the backs of PW3 and PW6 who were sitting on the other bench, the 1st accused suddenly attacked him with a parang (P15) after the 1st accused had called out to the 2nd accused in a foreign language which he took to be a signal for the 2nd accused to attack. The 2nd accused came from another direction and managed to get hold of PW3 while PW7 managed to evade the P15 which the 1st accused swung at him and ran but returned to try to rescue the deceased who was then crying for help and being dragged by the 1st accused with one hand around the neck of the deceased and the other hand holding P15. PW7 fled a second time when he saw the 2nd accused was going for him. PW7 testified that although it was already after sunset that the attacks took place he could still see the features of the two attackers whom he described. The one who attacked him with P15 was wearing a batik shirt whom he identified as the 1st accused. The other attacker was wearing a white shirt and was identified by him as the 2nd accused. The testimony of PW6 was consistent with that given by PW7 in material particulars. He described the 1st accused as the person who attacked PW7 and the deceased with a parang and 2nd accused as the person the 1st accused called out to just before the attack and said that the 2nd accused was wearing a white shirt. PW6 testified that he saw both the 1st accused and the 2nd accused and although it was already sunset their features were clearly recognizable. He identified the deceased and testified that as he was fleeing he heard the deceased's cries for

help. He also said that he saw the 1st accused watching them minutes before the attack and the 1st accused was then smoking a cigarette. PW3 testified that the 1st accused was wearing a batik shirt and was smoking a cigarette before he called out to the 2nd accused who was wearing a white shirt and attacked PW7 and the deceased with P15. PW3 said that the 2nd accused grabbed her hand but she managed to break free and fled. She also heard the deceased's cries for help after she managed to free herself from the 2nd accused's grasp. She also saw the features of both accused clearly because it was not so dark then for her to be able to see.

[4] ASP Dennis Leong (PW27) received information relating to the incident at Sandakan Park at 9.15pm on 26 March 2001. He proceeded to Sandakan Park and led a team of police personnel to search the area.

[5] At the edge of the jungle PW27 saw reddish spots on leaves which appeared to be blood and followed the trail. Eventually, PW27 and his team came across a hut in a banana garden. PW27 discovered a dead body lying on its back on planks inside the hut. PW27 saw wounds on the neck, fingers and hand including what appeared to be a bite mark. The dead body was taken from the hut to a waiting police vehicle at Sandakan Park. There, PW7 identified the dead body as Amanra bte Jakaria. The deceased was taken to the Sandakan Hospital where a post mortem was conducted on 27 March 2001 at about 10.50am by Dr. Thialagawatya (PW2). According to PW2 there were two neck wounds on the deceased: one was on the left side of the neck just below the mandible exposing the muscle, a 5-inch clean cut wound; the other was a 4-inch chopped clean cut wound to the right of the back of the neck which cut into the cervical vetebra at C3 level with the cervical cut through up to the trachea. The cause of death was resection of the cervical cord at C3 level. She said the wounds could be caused by a sharp object, for example, a large knife. Her post mortem report was admitted as prosecution exh. P41. PW2 testified that she took vaginal swabs from the deceased which were sent for DNA analysis carried out by Dr. Seah Lay Hong (PW4) whose report was produced and admitted as prosecution exh. P47. The blood sample of the 1st accused was also sent to PW4 for DNA analysis. The result stated in the report P47 was as follows:

> The DNA typing results indicate that the male profile derived from the vaginal swabs "X" matches the profile obtained from blood specimen "EX33" (labeled "Ronny b. Abdullah"). The probability of a coincidental match from a randomly selected, unrelated individual is 1 in 5.2 billion based on the population database of Malaysia Malays.

[6] The pubic hair combing sample obtained by PW2 during the post mortem was sent for analysis. The analysis was carried out by Ahmad Rizuan Ibrahim (PW1). His analysis revealed that three strands of hair from the pubic hair combing sample taken from the deceased matched the pubic hairs taken from the 1st accused.

[7] The prosecution also led evidence on various items recovered in the course of police investigation. PW27 testified that he recovered a pair of shirt (P19) soaked in a plastic pail at the place where the deceased was discovered. PW3, PW6 and PW7 identified P19 as similar to the shirt worn by the 1st accused when they were attacked and described by them as a "batik" shirt. Other items recovered by PW27 were a pair of wooden sandals, the left side was recovered near the blood trail and the other side was found at the hut where the deceased was found. The pair of wooden sandals (P23) were identified by Esah bt. Esong (PW13) the mother of the deceased, as the sandals worn by the deceased. The jeans skirt (P21) recovered by PW27 at the hut was also identified by PW3, PW6 and PW7 as the one worn by the deceased. P15, the weapon used in the killing of the deceased was recovered from the house at Taman Khong Lok, Sandakan as a result of information given by the 1st accused who led a police team to recover it from the house. P15 was identified by PW3 and PW7 as the parang which was used by the 1st accused at the scene of the attack. PW6, however, testified that it was similar to the one wielded by the 1st accused.

[8] Chief Inspector Majari (PW20) testified that the 1st accused led a police team to a banana garden at Mile 7, Sandakan where a white body-fit shirt (P34) was recovered. P34 was identified by PW7 and PW13 as the shirt which the deceased wore on the day the attack took place.

[9] That was the case for the prosecution and on that basis it was submitted by the learned DPP that the prosecution had established its case against the 1st and 2nd accused as charged. Learned counsel for the 1st accused contended that the prosecution had failed to adduce sufficient evidence to establish that it was the 1st accused who had committed the *actus reus* of the offence charged, alternatively, it was argued that the injuries sustained by the deceased did not "reflect the intention to kill". For the 2nd accused, it was argued by learned counsel that the prosecution had failed to establish the essential element of common intention and that the 2nd accused was mistakenly identified as the other person who, together with the 1st accused, attacked PW3, PW6, PW7 and the deceased on the evening of 26 March 2001.

[10] It was incontrovertibly proved by the prosecution that the deceased, Amanra bt. Jakaria, was found dead on the night of 26 March 2001 and so was the fact that her death was caused by the wound at the back of her neck. In order to establish the other elements of the offence for which the 1st and 2nd accused were charged - that in furtherance of a common intention the 1st and 2nd accused did commit murder by causing the death of the deceased by slashing her with a parang, the prosecution relied entirely on circumstantial evidence. The principles to be applied can be found in some of the authorities cited both by the prosecution and the defence, but first, it must be said, at the risk of stating the obvious, that the evidence led by the prosecution were credible and reliable.

[11] In *Eng Sin v. PP* [1974] 2 MLJ 168 at p 168 Gill delivering the judgment of the Federal Court quoted a passage from *Martin v. Osborne* [1936] 55 CLR. 367 at p 375:

> If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued. The moral tendencies of persons, their proneness to acts or omission of a particular description, their reputations and their associations are in general not matters which it is lawful to take into account, and evidence disclosing them, if not otherwise relevant, is rigidly excluded.

[12] Balia Yusof, in *PP v. Magendran Mohan* [2005] 3 CLJ 592 HC said at p 599:

> Pollock CB likening circumstantial evidence to a rope comprised of several cords, said:
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> > One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.
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> Thomson in *Chan Chwen Kong v. PP* [1962] MLJ 307 observed:

A

> ... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?.

B

In dealing with circumstantial evidence, the court must be satisfied that the evidence when considered together must point only to the guilt of the accused and it must not be capable of any other interpretation or any other meaning.

[13] *Sunny Ang v. PP* [1968] 2 MLJ 195 was a case where the accused C was convicted entirely on circumstantial evidence even though the body of the deceased was never found. His appeal to the Federal Court was dismissed and this was what Tan Ah Tan, Ag said at p. 198:

The first passage, which comes after the direction in which the learned trial judge deals with what he refers to as the first question of the D cumulative effect of circumstantial evidence, is as follows:

> The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was E the accused who committed this crime. Or is there some reasonably possible explanation such, for example - 'Was it an accident?."

The second passage is as follows:

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> Now, as I told you earlier on, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, the total effect of them, all lead you to? Adding them together, considering them, not merely each one in itself, but G altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts?
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> The prosecution case is that the effect of all this evidence drives H you inevitably and inexorably to the one conclusion and one conclusion only: that it was the accused who intentionally caused the death of this young girl." In our opinion, these directions are perfectly adequate in a case where the prosecution are relying on circumstantial evidence.

I

[14] The facts and circumstances established by and relied on by the prosecution were these.

1. The 1st accused was last seen dragging the deceased with one arm around her neck and the other holding a parang.

2. The 2nd accused had assaulted PW3 at about the same time as the 1st accused attacked PW7 and the deceased with a parang at Sandakan Park.

3. The attack by the 1st accused and the assault by the 2nd accused occurred immediately after the 1st accused had called out to the 2nd accused.

4. The deceased was last seen being dragged by the 1st accused and her cries for help as she was dragged was the last that was heard from her.

5. The 2nd accused was last seen in the vicinity when events in 3 and 4 took place,

6. The events in 1 and 2 took place at around 6.30pm and the dead body of the deceased was found at a hut only hours after that.

7. Recovery of the parang (P15) used for inflicting the injures sustained by the deceased.

8. Recovery of the sandals and jeans skirt worn by the deceased on the night the dead body was found.

9. The 1st accused led the police to recover the body-fit shirt worn by the deceased near the place where the dead body was found.

10. Identification of the 1st and 2nd accused as the persons wearing the "batik" shirt and white shirt respectively who attacked PW3, PW6 and PW7 and the deceased at Sandakan Park after sunset on 26 March 2001.

11. The DNA typing result indicated that the male profile derived from the vaginal swabs taken from the deceased matched the profile of the blood specimen taken from the 1st accused.

12. Three strands of hair from the pubic hair combing sample taken from the deceased matched the pubic hairs taken from the 1st accused.

[15] I was satisfied that the cumulative effect of these series of unbroken chain of circumstantial evidence led to the irresistible inference and conclusion that either the 1st or the 2nd accused slashed the neck of the deceased which resulted in her death and that the slashing was in furtherance of a common intention to commit murder by causing the death of the deceased Amanra bte Jakaria. In *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 Syed Agil Barakbah delivering the judgment of the supreme court said:

> Where the prosecution case rests on circumstantial evidence, the circumstances which are approved must be such as necessarily lead only to that inference Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused.

Huggard, in *Rex v. Vincent Banka & Anor* [1936] MLJ 53 at p. 56 cited with approval a passage from the judgments of the Full Bench in the case of *The Emperor v. Nga Aung Thien* reported in the All India Reporter (Rangoon) for March 1935:

> The following extracts from the judgments of the Full Bench may usefully be quoted. At page 90 of the report Page CJ says:
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> Whether or not a criminal act is done by several persons in furtherance of the common intention of all, is a question of fact to be determined on a consideration of the facts in each case, and the common intention may be inferred from the circumstances disclosed in the evidence, and need not be the subject of an express agreement between the persons concerned.

In *PP v. Muhamad Nasir Shaharuddin & Anor* [1994] 2 MLJ 576 it was held that in cases of common intention, the prosecution need only establish that one of the accused committed the act and that the others participated in it in furtherance of a common intention. Applying these principles to the facts and circumstances I have set out above it was abundantly clear that the prosecution had established the element of common intention. The distinction between culpable homicide not amounting to murder and murder was enunciated in the Federal Court case of *Tham Kai Yau & Ors v. PP* [1977] 1 MLJ 174 where Raja Azlan Shah (as His Majesty then was) at p 178 said:

> Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that ... the act is likely to cause death.

> Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and... is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.
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> The words which I have italized show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder.

The two clean cut wounds on the neck of the deceased were inflicted on a very vulnerable part of the human anatomy. They were gruesome: one exposed the muscle while the other cut through the cervical up to the trachea, which was the cause of death. The irresistible inference was the intention to kill the deceased. An analogous observation and conclusion was made in *Tan Buck Tee v. PP* [1961] 27 MLJ 176 at p. 177 where Thomson said:

> There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.

Learned counsel for the 1st accused argued that PW2 did not testify as to the "likely and natural effects" of the injuries nor as to whether such injuries would have caused immediate death. Hence, the contention that the intention to kill had not been established. Learned counsel relied on *Tham Kai Yau (supra)* where the medical witness was not asked to give his opinion on these matters and the Federal Court set aside the convictions for murder and substituted them with one under the first part of s. 304 of the Penal Code. That proposition was not intended to cover all cases. This was made perfectly clear at p 177:

> We have thought it necessary to deal with this matter at some length to ensure if possible that our finding shall not be construed as a declaration that in all cases such as the present the offence is culpable homicide not amounting to murder.

Here, the nature of the injuries inflicted on the deceased, the weapon used and the part of the anatomy where the injuries were sustained were totally different. The argument advanced on behalf of the 1st accused could not, therefore, colour the prosecution case nor could the argument

of mistaken identity advanced on behalf of the 2nd accused because it was not suggested that at around 6.30pm on the evening of 26 March 2001 it was already pitch-dark; PW3, PW6 and PW7 who were variously at very close proximity to the 1st and 2nd accused all testified that at that time it was not so dark as to impair their ability to recognize the features of the 1st and 2nd accused.

[16] Applying the test, standard and procedure set out in *Balachandran v. PP* [2005] 1 CLJ 85 FC to the whole evidence adduced by the prosecution, I was satisfied that the prosecution had made out a *prima facie* case and accordingly called upon the 1st and the 2nd accused to enter their defence. This was what was laid down in the judgment of Augustine Paul at pp 99-100:

> A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whiteley's Law Dictionary*, 11th edn as:
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> > A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
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> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established ...
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> Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the dose of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

> As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s. 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence.

The 1st accused gave evidence on oath. He had his education in Tawi-Tawi, Philippines and came to Sabah 21 years ago and had not been back to the Philippines ever since he came to Sabah when he was 11 years old. On 26 March 2001 he was at the foot of the hill at Rimba Park working overtime as a construction worker until 7pm.

[17] After that he went to Rimba Park because he had seen earlier the deceased was with PW7. He was accompanied by a co-worker named Taha whom he called Wahid. The deceased was his lover and had known her since 1995. He saw both PW7 and the deceased at the recreational hut and saw PW7 fondling the deceased and PW7 was on top of the deceased. He also saw PW3 and PW6 at the hut. When the 1st accused saw what the deceased and PW7 were doing he was deeply incensed but his anger was not towards the deceased; it was towards PW7 who was disturbing his lover, the deceased. The 1st accused took out a samurai sword which he brought with him intending to attack PW7. While PW7 was still on top of the deceased the accused struck PW7 twice with the samurai sword but missed because PW7 managed to evade them; instead the deceased got struck on her neck by one of the two strikes. When the 1st accused was attacking PW7 Wahid grabbed PW3. After PW3 and PW7 ran away, so did Wahid, leaving the 1st accused alone with the deceased in the hut. She was still alive but unable to speak. The 1st accused then removed the deceased's clothing and bathed the deceased with water from a source nearby because he wanted to clean the blood from the body. After giving the deceased a bath and while she was still alive he had sexual intercourse with the deceased because he was mad with PW7. He admitted to biting the deceased's cheek for the same reason. The 1st accused finally took the deceased to the hut at the banana garden, and laid her there. He left after she was dead.

[18] The 1st accused sent the samurai sword to Taganak Island through his cousin. His various descriptions of the weather condition at 6.30pm on 26 March 2001 were this: not so dark, with a little bit of light; partly dark and partly bright; and it was dark on his right with a little bit of light from his left. He said he led the police to the 2nd accused's house at Kampung BDC where the 2nd accused was arrested. He also testified that the 2nd accused was his brother-in-law. He also led the police to his auntie's house at Taman Khong Lok where P15 was recovered.

[19] Salmah Ugah (DW2) was called as a witness for the 1st accused. She said when a police team came to her house at Taman Khong Lok on 9 April 2001 at about noon together with the 1st accused he showed PW27 where she kept the parang which the 1st accused used when he did work for her and handed the parang to PW27, she testified that the parang which the police subsequently seized looked similar to P15. DW2 was not related to the 1st accused but she knew him since 1991-1992 when she was renovating her kitchen and the 1st accused worked on the renovation. After the renovation was completed the 1st accused would still sometimes come to her house and ask her whether there was any work for him to do and when she told him there was none he would tell her that he could do anything. Sometimes she would pity the 1st accused and ask him to cut the grass under flower plants and would then give him something to drink and eat, give him a little bit of money and ask him to go back. Her impression of him was that on some occasions he appeared to her to be stupid but was nevertheless obedient and hardworking.

[20] The 2nd accused gave evidence on oath to establish his *alibi*. He said he was 37 years old and resided at Jambatan C Kampung BDC Sandakan where he was arrested on Sunday, 8 April 2001 at around 8.30pm The 2nd accused was his brother-in-law, his wife's younger brother. He knew the 2nd accused since February 2001. He said that on 26 March 2001 between 4.30pm to 6.30pm he was at Batu Putih, Mile 7, Kampung Alayan building a house for one Haji Aras, a Bugis. He started building the house on 1 March 2001 and worked six days a week from Monday to Saturday from 7am to 6.30pm with a one-hour break from 12 noon to 1pm He stayed there during work days and returned to his house at Kampung BDC every Sunday and went back to Kampung Alayan every Monday. His son Julastry was his helper and followed the same routine. He maintained that although 26 March 2001 was a public holiday – Awal Muharram, a muslim holy day, he worked on that day.

[21] The testimony of Julastry bin Paul (DW4) was essentially a precise repetition of the particulars of the 2nd accused's *alibi* except for a single slip when he said that on the night of the 2nd accused's arrest he had just returned from Batu Putih but later changed the story by saying that he had returned from Batu Putih that evening at 6.30pm but went out fishing at 7pm with his uncle.

[22] Having considered all the evidence adduced at the conclusion of the trial, I am satisfied that the prosecution has proved its case beyond reasonable doubt. In *PP v. Saimin & Ors* [1971] 2 MLJ 16 at p 18, Sharma said:

> A conviction cannot be sustained even if the court is satisfied that the prosecution story "may be true" unless and until it is found that the prosecution story "must be true". The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The burden of proving guilt in a criminal charge is always on the prosecution except in certain cases with which we are not concerned here.

[23] I find the testimony given by the 1st accused relating to the killing of the deceased to be inherently incredible, a version which is concocted by the 1st accused. Be that as it may, Richard Malanjum, (as he then was) said in *PP v. Sainal Abidin Mading* [1998] 3 CLJ 41 HC at p 43:

> To secure a conviction on the charge preferred the burden of proof remains with the prosecution throughout. The standard of proof required is beyond reasonable doubt. There is no similar burden on the accused. He is presumed innocent until proven guilty. And in order to avoid a conviction on the charge preferred the accused is only required to introduce a reasonable doubt in the prosecution case. His version may not necessarily be true. But if it succeed in creating a reasonable doubt in the prosecution case, that is sufficient to defeat the charge preferred.

[24] The argument of learned counsel for the 1st accused on the murder weapon and the testimony of DW2 that P15 was not sharp coupled with the admission of the 1st accused that he had inflicted an injury on the deceased's neck does not cast a reasonable doubt on the prosecution's case. DW2's evidence in cross-examination was that P15 could cause injuries. It was never suggested that P15 was blunt.

[25] I have also meticulously considered the *alibi* of the 2nd accused and find that it has not been established. DW4 is the son of the 2nd accused and his evidence must be evaluated with utmost care. The precise details of the matters relating to the *alibi* which the 1st accused

A and his son DW4 echoed in identical terms in their respective testimonies coupled with the fact that it is unsafe to rely on DW4's testimony lead to the inevitable conclusion that the *alibi* was manufactured. On the totality of the evidence before me I am satisfied that the 2nd accused has not succeeded in casting a reasonable doubt on the prosecution case. B The argument of mistaken identity advanced on his behalf is of no consequence. PW3, PW6 and PW7 all saw him in close proximity at the scene of the attack when there was still a little bit of light and he was correctly identified at the identification parade as the other person who attacked them on 26 March 2001. Although the identification parade C was conducted two days after the 2nd accused had been locked up it was never suggested that he was identified on the basis of the bad smell he acquired as a result of that. The testimony of the 1st accused to the effect that the other person with him on 26 March 2001 was one Taha or Wahid and not the 2nd accused was a manifestation of the 1st accused's desire to protect his brother-in-law. The absence of motive is D of no consequence because it is not an essential requirement for murder, although if one is established it would be useful for the prosecution to prove its case. (See *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC). This piece or evidence or lack of it and other small pieces of evidence of trivial inconsistencies could not E affect the veracity of the witnesses for the prosecution nor colour the evidence led by the prosecution as a whole. On the totality of the evidence adduced at the trial the prosecution has established the charge against the 1st and 2nd accused beyond reasonable doubt and for the reasons I have attempted to describe I find that the 1st and 2nd accused F have failed to cast a reasonable doubt on the prosecution case.

[26] The murder of this young 18 year old girl is heinous and the cruelty so extreme that beasts are rarely, if ever, known to be capable of.

G **[27]** I find the 1st and the 2nd accused guilty as charged and convict them of the offence charged. The only sentence that I can pass is death by hanging. Order accordingly.

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